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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

(5)

NO. 86-1453

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al.,
Respondents.

On Petition for Writ of Certiorari or Mandamus to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Nothing in respondents' brief detracts from the overriding importance of the issues in "this closely followed precendent-setting litigation,"[1] the antitrust aspects of which this Court previously agreed to hear even in an interlocutory posture. The Court of Appeals' determination on remand below finally dismisses *all* the antitrust and antidumping claims of the two American petitioners, Zenith Radio Corporation and National Union Electric Corporation.[2] The issues involved now assume even greater importance.

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1. Respondents' own characterization in their June 7, 1984 petition for writ of certiorari in this case at No. 83-2004.

2. Nonetheless, the Court of Appeals' decision on remand does not end the litigation, because respondents' multi-million-dollar antitrust counterclaims against Zenith are still pending in the district court.

1. The Court Below Misconstrued This Court's Mandate.

Respondents attempt to portray the Court of Appeals' *sua sponte* determination to reopen its separate *antidumping* judgment on remand from this Court's antitrust decision in *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corporation*, 475 U.S. ____, 106 S.Ct. 1348 (1986), as a development independent of any requirement the Court below perceived in this Court's narrow 5-4 decision in the antitrust segment. Brief in Opposition at 6-9. The Court of Appeals' Opinion on remand makes the exact opposite clear. The Court of Appeals expressly stated that it believed it was "*directed* to reconsider not only the Sherman Act claims, *but the entire case*." (A-6).[3] The Court of Appeals explicitly set forth its belief that the language of this Court's Opinion "appears to suggest that [the Court of Appeals] *must reconsider the Antidumping Act claims on which the Supreme Court did not grant certiorari*, as well as the Sherman Act claims which it did review." [4]

Moreover, the Court of Appeals confessed its puzzlement concerning the nature and scope of the remand, pointing to the fact that this Court "had the very same summary judgment record before it that [the Court of Appeals] had considered" as well as the fact that this Court "exercise[s] the same plenary review of the propriety of the district court summary judgment." (A-6).

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3. References to the Appendix to the Petition are cited herein as "A- ".

4. Respondents erroneously suggest that the Court of Appeals simply exercised "clear authority under 28 U.S.C. § 2106" in "reconsidering its 1916 Act decision." Brief in Opposition at 8. However, the Court of Appeals cited only this Court's mandate as authority for its action. It never invoked 28 U.S.C. § 2106 as the basis for its action. Moreover it is doubtful whether courts of appeals possess continuing, uncircumscribed powers under § 2106 to amend and modify judgments — such as the Court of Appeals' separate antidumping judgment — which have not been appealed.

The Court of Appeals stated that it was bound by "the law of the case" with respect to all of the issues it addressed on remand. After reciting the record economic evidence on which it had relied in previously reaching its contrary conclusions (A-7), the Court of Appeals explicitly stated that this Court's discussion of respondents' presumed economic motives constituted "holdings . . . [that] are the law of the case and are binding on this Court." (A-7). The Court of Appeals' repeated confessions of confusion aside, there can be no serious question that the Court of Appeals (i) believed itself bound by the "law of the case" doctrine with respect to the motive issue, and (ii) believed it was required to apply this "law of the case" not only in its further consideration of petitioners' Sherman Act claims, but also to dismiss petitioners' separate individual and conspiracy claims under the Antidumping Act of 1916, 15 U.S.C. § 72.

2. The Court of Appeals on Remand Did Not "[search] the enormous record in this case for any evidence of specific predatory intent." Brief in Opposition at 10.

In the aftermath of its comments regarding the "law of the case," the only consideration the Court of Appeals gave to the element of intent under the Antidumping Act of 1916 is limited to a cryptic *one-sentence* conclusion that this Court's antitrust Opinion required "*other evidence*" and its comment that there was "no other evidence tending to show that any of the defendants still in the case dumped consumer electronic products with the required intent to injure or to destroy a United States industry." (A-11).

The Court below thus put aside and ignored all the intent evidence it had considered relevant in its earlier opinions. No mention is made of the legal advice on antidumping matters that respondents received throughout the entire period from their sophisticated United States trade counsel, or of respondents' intimate familiarity with United States antidumping laws. No

mention is made of respondents' active participation in the antidumping proceedings relating to television receivers imported from Japan, proceedings that resulted in a Treasury Department finding of dumping and, in 1971, the United States Tariff Commission's unanimous finding that the United States industry had been injured by respondents' dumping. Nor is mention made of respondents' subsequent continuation of their dumping after the injury finding and the Japanese companies' clandestine import schemes for concealing this ongoing dumping from United States Customs officials in order to enable them to continue to dump, with the attendant continuing injury to the United States industry of which respondents were thereafter certainly on notice.

In short, the voluminous record evidence clearly supports the conclusion that respondents knew that dumping was illegal and, knowing this, engaged in such dumping, and deliberately did so with knowledge of its highly probable devastating effects on the United States industry, and that they acted with the conscious purpose of producing injury to the United States industry.[5] Court of Appeals on remand mistakenly believed it was precluded from giving weight to this evidence. Instead, giving effect to its understanding of the Sherman Act "law of the case," the Court below simply and perfunctorily reversed its conclusion on the Antidumping Act claims in the unreviewed antidumping segment of the litigation.

3. **The Intent Element of the Antidumping Act of 1916 Is Not an Insurmountable Obstacle to Relief.**

Respondents' contention that Congress deliberately crippled effective enforcement of the Act by introducing an intent element is not only self-refuting, but collides with settled doctrines regarding proof of intent. Brief in

5. In fact, respondents never disputed that petitioners' proof, as recited in their Final Pretrial Statement, was deficient with respect to actual damage. 723 F.2d at 311; Transcript of Oral Argument of November 12, 1985, at No. 83-2004, at 48.

Opposition at 10-11. The Act requires proof of dumping with only one of the five alternative mental states listed in the Act, *i.e.*, "with the intent [1] of destroying or [2] injuring an industry in the United States, or [3] of preventing the establishment of an industry in the United States, or [4] of restraining, or [5] monopolizing any part of trade and commerce in such articles in the United States." 15 U.S.C. § 72. Proof of an "intent of injuring" alone suffices.

As this Court has observed, "the required mental state may of course be different for different elements of a crime." *Liparota* v. *United States*, 471 U.S. 419, 423 n.5 (1985). Thus, the 1916 Act requires proof only of a mental state aimed at producing designated consequences flowing from dumping. The record evidence is sufficient to show it. It may even be inferred from the natural and probable consequences of respondents' acts. *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893); *United States* v. *Wilson*, 796 F.2d 55, 58 (4th Cir. 1986). Although proof of an "intent of injuring" may not involve proof of consciousness of wrongdoing, *mens rea* or "evil-meaning mind," proof of such an intent suffices under settled principles if it shows that defendants "knowingly did an act which the law forbids, purposely intending to violate the law." *United States* v. *Welch*, 810 F.2d 485, 488 (1st Cir. 1987); *United States* v. *Harrold*, 796 F.2d 1275, 1282 n.7; (10th Cir. 1986); *United States* v. *Hayes*, 794 F.2d 1348, 1351 (9th Cir. 1986).

The record is full of evidence of respondents' guilty knowledge, of their consciousness of guilt, and of a continuous course of conduct by each of them designed to conceal dumping — concealment aimed both at preventing detection of past dumping and at enabling them to continue to dump. Respondents deliberately set their United States prices at dumping levels below their own Japanese market prices and far below the prevailing prices of targeted United States television manufacturers. They set their so-called "check prices" — which they

falsely reported to United States Customs as their *actual* United States import prices — at levels below their Japanese market prices. They also acknowledged in the "Rationales" of their written "check price" agreements that if they priced their imports below "check price" levels their imports *would* injure United States manufacturers.

With advance knowledge of those injurious effects, and continuously receiving knowledge and information concerning the injury it had caused and was causing to the United States industry as their conduct proceeded, these companies systematically sold at United States import prices that were below the "check prices," and concealed their actual lower prices from United States Customs for the express purpose of evading the United States antidumping laws. 723 F.2d at 311. The record shows that the margins between their Japanese market prices and their United States import prices were as high as 60%. The enormous margins by which respondents *undersold* their United States competitors in the United States market were equally dramatic.

Respondents participated in the Treasury Department's dumping investigation, and thus were aware of the evidence of the decimation of the United States industry which was adduced in hearings and which led to the United States Tariff Commission's unanimous finding of injury to the United States industry. Nonetheless, thereafter the Japanese manufacturers continued to dump and to conceal their dumping. They lied about their prices on their customs entry documents at the time of importation. They again lied about their prices to the Treasury Department concerning their actual United States import prices in their questionnaire submissions in the dumping investigation.[6] They met with

6. Having lied in their questionnaire responses, defendants later attempted to block petitioners' access to those submissions in discovery in this litigation and then lied about their true prices again in their answers to petitioners' interrogatories.

importers and discussed steps to suppress testimony of knowledgeable witnesses on the issue of injury to the United States industry in the Tariff Commission's industry injury hearings.

Respondents' dumping was also carried out in such a way as not to interfere with each others' sales activities. Respondents admittedly registered, divided and allocated large United States importers among themselves, a step that ensured that the full brunt of the injurious and intended effects of their dumping was aimed at and brought down directly and exclusively on the American manufacturers competing against them for that business. 723 F.2d at 311. As the Court below found, this practice, combined with respondents dumping, "permit-[ted] concentration of the effects of dumping upon American competitors. . . ." 723 F.2d at 311.

Measured by any established standard of proof of a statutory mental element, such evidence is sufficient. Respondents were not only aware of a high probability of injury to the United States industry; such injury began to occur as soon as respondents began large-volume exports to the United States and continued for a substantial period of time as their dumping eliminated one after another of the United States manufacturers — including petitioner National Union Electric Corporation. Thus, respondents quickly came to possess *actual* knowledge of the injury their dumping caused to the United States industry and nonetheless continued to dump and to conceal their dumping with full knowledge of its illegality and of its effects on the United States industry.

Thus, but for the Court of Appeals' crucial misapplication of this Court's discussion of motive — in the unrelated context of its significance as circumstantial proof of conspiracy — and its belief that this Court's antitrust determination constituted novel and binding "law of the case" which required the Court below to vacate its

separate *antidumping* judgment, petitioners' record evidence clearly suffices to create a genuine issue of fact warranting a trial.

4. The Issues Are of Overriding Importance.

This litigation is no less important now that the Court of Appeals has completely foreclosed the possibility of legal relief to the American manufacturers than it was when, at respondents' behest, this Court previously agreed to review the Court of Appeals' prior wholly *interlocutory* reversal of summary judgments in respondents' favor. On the contrary, it is more important than ever.

The decision below is not only a final disposition of *all* of petitioners' claims; it totally emasculates the *only* Congressionally-created private remedy that American manufacturers have to protect their industries and their workers, and does so on a "law of the case" basis never contemplated in this Court's prior decision. The Court of Appeals' dismissive ten-page opinion on remand therefore has profound and adverse implications for the many American manufacturing industries that are forced daily to confront the trade onslaught dealt by vast foreign multinational enterprises with the pelf, proclivity, and unique economic incentive to employ dumping as a weapon to achieve their international trade objectives. The Court below, in its application of the Act, frustrates the purposes of a remedial statute.

Its decision is economically unsound. It fails to recognize and apply the distinctly different economic factors drawn into play by the two-market, two-price phenomenon of dumping.

Its decision is unfair. It permits and even encourages foreign manufacturers to dump their manufactured products into the United States from their high-price, closed home markets — a death sentence for the affected United States industries and their workers, who must attempt to survive in the long-run on sales at unrenumerative prices in this market without the luxury

of a non-competitive closed home market where high price levels permit their foreign rivals to recover all their fixed costs in large-scale production operations and to dump their expanding output here.

This litigation, before this Court now for a second time, is closely followed and precedent-setting. Its importance to crucial legal issues affecting this country's international trade policy is attested to by the fact that this litigation has been monitored from its inception by the Japanese Ministry of International Trade and Industry, which in its May 29, 1984 *Note Verbale* to the Department of State expressed its "keen interest in this case." Brief of the Government of Japan as Amicus Curiae in Support of the Petition for a Writ of Certiorari, Appendix at 1a, at No. 83-2004. The United States has even been told that this litigation "could very well create extensive feelings of frustration among the Japanese public." *Id.* at 3a. However, the interests of the many affected American industries and the feelings of frustration of the tens of thousands of unemployed American workers who formerly made their livelihood in these industries are no less important.

Finally, it must be remembered that the Antidumping Act of 1916 does not require higher prices in the United States. It requires only the elimination of substantial differentials between foreign home market prices and United States import prices. If foreign manufacturers are efficient enough to sell at the same low prices in both the Japanese market and the United States market, the Act does not impede them from reaping the full rewards of greater efficiency. But there is no demonstration of foreign manufacturers' superior efficiency in this record. Competition is a lawful and desirable end, but the basic law of conspiracy forbids not only agreement to do an unlawful thing, but also agreement "to accomplish some purpose not in itself criminal or unlawful *by criminal or unlawful means.*" *Pettibone* v.

United States, 148 U.S. 197, 203 (1893); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 465-66 (1921). The Act reaches such a conspiracy. It also reaches individual conduct.

As the recent trade sanctions imposed on Japan's dumped semiconductor products continue to illustrate, dumping and the devastating injury to American industries which it causes do not disappear with the transitory flutter of diplomatic obeisance. The continued effectiveness of the Congressionally-provided private remedy under the Antidumping Act of 1916 is and will remain crucial. The Court of Appeals' decision on remand, based on its misperception of "law of the case" established by this Court's decision in *Matsushita*, is a serious misstep on questions of national importance in the trade area.

CONCLUSION

Petitioners respectfully pray that the Court issue a writ of certiorari or of mandamus to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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